

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

RULES GOVERNING TELEPHONE
COMPANIES USE OF CUSTOMER
PROPRIETARY NETWORK INFORMATION

)
)
) CC Docket No. 90-623
) CC Docket No. 92-256

**COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, submits the following comments in response to the Commission's Public Notice, FCC 94-63, seeking comment on rules governing the use by telephone companies of Customer Proprietary Network Information ("CPNI").

INTRODUCTION

The Commission seeks comment on whether to revise its existing regulations with respect to Customer Proprietary Network Information(CPNI). The CPNI rules balance consumer expectations of privacy, efficiency and competitive equity. They were developed originally to deal with circumstances in which telephone companies simultaneously provide basic telephone service and enhanced services on an integrated basis.

The Third Computer Inquiry achieved this balance by permitting Bell Operating Companies(BOCs) and other telcos to utilize CPNI of residential and small business customers(defined as those with fewer than 20 access lines) without customer authorization in the course of rendering service to these customers. Restrictions are imposed on BOCs, and the Commission recently decided to apply

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the same restrictions to GTE, when they market enhanced services to larger customers.

The Commission's 1992 Video Dialtone Order applied the Third Computer Inquiry's CPNI regulations to the video dialtone(VDT) service without taking account of differences between traditionally conceived narrowband enhanced services offered by telcos, and VDT services. In the process, the Commission rejected comments by NCTA and others calling for imposition of special limitations on the use of CPNI in the VDT context. Since then, NCTA has repeatedly asked the Commission, through a petition filed jointly with the Consumer Federation of America seeking the commencement of a comprehensive VDT safeguards rulemaking, and in response to individual Section 214 applications, to revisit this matter. In the following comments, we describe the particular problems that will arise without significant changes to the existing arrangements, and we urge the adoption of the privacy procedures applied to cable operators to more effectively guard against the improper use by telephone companies offering VDT of Customer Proprietary Network Information.

I. CPNI SAFEGUARDS FOR VIDEO DIALTONE SHOULD BE ESTABLISHED IN A COMPREHENSIVE VDT SAFEGUARDS PROCEEDING

In the BOC Safeguards Order,¹ the Commission was faced with the task of balancing three factors: the potential efficiencies of enabling consumers to purchase telephone services and enhanced services from the same company(so-called "one-stop shopping"); the potentially detrimental impact to competition of a joint marketing process; and the risks to privacy that might arise if telcos are permitted

¹ Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd. 7571(1991) ("BOC Safeguards Order").

to undertake the joint provision of basic and enhanced services, particularly on an exclusive basis. It was decided that, with respect to residential and small business users(i.e., those with fewer than 20 access lines), the benefits of one-stop shopping overcame other considerations. As a result, the BOCs and other telcos were permitted to utilize information obtained in the course of providing basic service to market enhanced services to these same customers.

The Commission authorized VDT in 1992. At that time, in response to comments by NCTA and others, the agency considered and rejected the contention that VDT posed unique privacy concerns that justified treatment of the privacy issue in a manner that is different from the treatment accorded to providers of traditionally-conceived enhanced services. In a brief footnote, the Commission brushed aside the suggestion that VDT warrants a different approach. Merely citing the BOC Safeguards Order in support of its action, the decision summarily concluded that there was "... no reason to amend these rules in the video dialtone context."²

Developments since the August 1992 adoption of VDT make the need for VDT-specific safeguards all the more urgent. In particular, exempting residential and small business customers from CPNI regulations would undermine the very purpose of privacy protection in this context. Petitions for reconsideration submitted in October 1992 that called for a reevaluation of the efficacy of CPNI and other safeguards have not been acted upon. The Consumer Federation of America and NCTA have sought a rulemaking on such safeguards, thereby providing to the Commission a vehicle for the comprehensive evaluation of appropriate protections, including those related to CPNI. More than 20 individual applications to offer

² Telephone Company/Cable Television Cross-Ownership Rules, 7 FCC Rcd. 5781, 5830 at n.243 ("Video Dialtone Order" or "VDT Order").

service, either on a trial or commercial basis, have been filed. In contrast to the situation that existed 20 months ago when actual applications to offer service were not before the Commission, the intentions of telephone companies to provide VDT are quite clear. It is, therefore, incumbent upon the Commission to take a hard look at the issue and to decide upon CPNI protections for VDT at the earliest possible date.

NCTA has made persistent efforts over the past 20 months to persuade the Commission to adopt VDT-specific safeguards concerning CPNI and other matters. The purpose of the CFA/NCTA Petition for Rulemaking was to provide a focal point for debating these issues. At the same time, the Commission's determination in the 1992 VDT Order to consider additional safeguards in the context of individual Section 214 applications has left NCTA with no alternative to raising CPNI and other safeguard matters in these proceedings. While telephone companies responding to NCTA's petitions to deny generally urge the summary rejection of additional CPNI and other safeguards on grounds that the matter was previously resolved in the VDT Order that response is little more than a refusal to engage the difficult questions.

NCTA continues to believe that all VDT safeguard issues should be addressed and resolved in a single, comprehensive rulemaking. We urge the Commission to act promptly on the CFA/NCTA Petition. The issues raised in the Petition should not be resolved piecemeal, either by establishing precedents in individual Section 214 proceedings in which all interested parties do not have an opportunity to participate, or through separate proceedings on individual safeguards in which the telephony context predominates. Our participation in this proceeding should not be taken as reflecting the belief that prompt action on the Petition is no longer required.

II. ADOPTION OF VDT-SPECIFIC RESTRICTIONS ON THE USE OF CPNI IS ESSENTIAL TO THE PROTECTION OF CUSTOMER PRIVACY

The risks to customer privacy that can arise from telephone company use of CPNI in the VDT context are different in character and scope from the risks that are associated with the joint provision of basic telephone service and enhanced services. The existing CPNI rules have been intended to promote a mass market in narrowband enhanced services that was in the early stages of development and not focused on the content of the messages that subscribers select. The video market, in contrast, is well developed and reliant upon program content to elicit consumer demand.

The non-content basis of the CPNI rules in the telephone context is apparent from the examples used by the Commission to justify one-stop shopping in the BOC Safeguards Order. In that case, the Commission reasoned that if a customer called to discuss the availability of basic network services such as additional lines or call waiting, and then wanted to discuss the arrangements under which he or she might obtain voice mail, the basic service representative would be required to transfer the customer to an enhanced services representative who would likely require the repetition of already provided information. Consumers would be better off with integrated marketing and sales, in which

... the BOC service representative receiving a call can also offer consumers additional choices that might better suit their needs, including combinations of basic and enhanced services. For instance, a customer service representative might suggest a voice mail service to record messages when a customer's line is busy as a more economical alternative to ordering additional lines.³

³ BOC Safeguards Order, 6 FCC Rcd. at 7610.

The Commission further explained that under the prior authorization rule applied to larger users, the great majority of mass market consumers are "likely to have their CPNI restricted through inaction."⁴ To serve these customers, BOCs would be required to staff their business offices with separate groups of service personnel, thereby limiting the potential efficiency benefits that were anticipated from the replacement of structural separation with nonstructural safeguards.⁵

The advent of video dialtone requires that the Commission reevaluate this cost/benefit calculation. In the course of providing VDT, telephone companies will become privy to some of the television viewing habits of residential subscribers. As transmission networks become more sophisticated and per-program services become more widely available, telcos will gain access to specific program selection information relating to individual customers.

Unless restricted by regulation, telcos will be able to use this information for business purposes that the Commission should view as undesirable. It will be possible, for example, for a telco to determine a consumer's interest in children's programming and to sell the subscriber's name to a toy manufacturer. A telco would be able to calculate the interest of a subscriber in programming deemed favorable to a particular political party, and to sell the subscriber's name to like-minded organizations for political fund-raising purposes. A telco might also decide to provide information on television viewing habits to sellers of videotapes, thereby enabling these firms to more precisely target their marketing efforts. VDT subscribers should be able to watch television without fear of such blatant invasions of privacy.

⁴ Id., 6 FCC Rcd at 7610, n.155.

⁵ Id., 6 FCC Rcd. at 7611, n.155.

In advocating restrictions on telco use of CPNI in the context of VDT, NCTA merely seeks restrictions on telco use of subscriber viewing information that are equivalent to the limitations that have been imposed on cable companies for nearly a decade. The Cable Communications Policy Act of 1984 "... creates a nationwide standard for the privacy protection of cable subscribers by regulating the collection, use and disclosure by cable operators of personally identifiable information regarding cable subscribers."⁶

Pursuant to the Act, cable operators must provide cable subscribers, at the time of service initiation and at least once a year thereafter, with a written statement that describes the nature of personally identifiable information that is collected, the nature and frequency of its disclosure, the period for which it is maintained and the time and place at which the subscriber may have access to the information. Cable operators are generally prohibited from using the cable system "... to collect personally identifiable information concerning any subscriber without the prior written consent or electronic consent of the subscriber concerned."⁷ And, cable operators are prohibited from disclosing, and are required to affirmatively act to prevent unauthorized access, of personally identifiable to any person except the subscriber and the cable operator.⁸ Personally identifiable information may be collected only when necessary to render a service or to detect cable signal theft.⁹

In addition, a cable operator must provide a subscriber with an opportunity to correct errors in personally identifiable information that has been gathered.¹⁰

⁶ H.R. Rep. No. 934, 98th Cong., 2d Sess. 76 (1984).

⁷ 47 U.S.C. § 551(a)(1).

⁸ 47 U.S.C. § 551(c)(1).

⁹ 47 U.S.C. § 551(b).

¹⁰ 47 U.S.C. § 551(d).

The operator must destroy the information if no longer needed, unless the subscriber has a pending request for its use, or pursuant to a court order.¹¹ A subscriber aggrieved by a violation of these procedures may obtain actual and punitive damages, as well as attorneys fees and litigation costs, in federal district court.¹² Finally, where a governmental entity obtains personally identifiable subscriber information, and attempts to use the information as material evidence in a criminal proceeding, the subscriber must be afforded the opportunity to appear and to contest the governmental entity's claim.¹³

There is no justification for not imposing the Cable Act's privacy regulations on VDT systems. The Commission should act promptly, either in this proceeding or as part of a comprehensive VDT safeguards rulemaking, to prevent the misuse of personally identifiable information regarding cable subscribers. Failure to act poses unconscionable risks to consumers.

¹¹ 47 U.S.C. § 551(e).

¹² 47 U.S.C. § 551(f).

¹³ 47 U.S.C. § 551(h).

CONCLUSION

The CPNI regulations of the Third Computer Inquiry were never intended to protect television subscribers against the misuse of personally identifiable television viewing information. With the advent of video dialtone, new procedures are essential. The privacy regulations under which cable systems operate offer an effective mechanism for protecting consumers.

Respectfully submitted,

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